STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Fitzgerald, P.J., and Bandstra and Gage, J.J.

In the Matter of C.A.W., Minor.

Supreme Court No.: 122790
Court of Appeals: 235731
Macomb Circuit Court No.: 92-36958 NA

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellant,

v

LARRY A. HEIER,

Appellee,

and

DEBORAH ANN WEBER AND ROBERT RIVARD,

Respondents.

BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

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STATUTES AND COURT RULES

QUESTIONS INVOLVED

Whether the biological father of a child conceived and born while the mother was lawfully married to another man, has standing to intervene in a termination proceeding for the purpose of establishing his paternity?

Appellee answers "YES"

Appellant answers "NO"

Trial Court answered "NO"

The Court of Appeals answered "YES"

COUNTER STATEMENT OF FACTS

The Brief of the Attorney General recites many irrelevant "facts" from a transcript which is not part of the record on appeal and which is from a hearing where Appellee did not have notice and was not a party. Following are the facts relevant to this case.

Appellee, Larry A. Heier, asserts that he is the biological father of the minor child, C.A.W., date of birth: February 17, 1997, who was the subject of child protective proceedings in the Macomb County Circuit Court, which resulted in the termination of parental rights of the mother and the "legal" father. Judge Pamela Gilbert O'Sullivan of the Family Division of the Macomb County Circuit Court denied Larry A. Heier's Motion to Intervene in child protective proceedings involving the mother and her husband. The Judge held that Larry A. Heier was "a putative father" and that a child could not have both a legal father and a putative father at the same time. The Court relied upon an unpublished decision of the Court of Appeals to hold that Larry A. Heier lacked standing to intervene in the proceedings.

Larry A. Heier filed a timely appeal, of right, to the Court of Appeals, which was dismissed by an Order dated June 13, 2001. ***(42a)*** On September 12, 2001 the Court of Appeals granted leave to appeal.***(43a)***

In a published Opinion dated November 1, 2002, the Court of Appeals reversed the Circuit Court and remanded the case to the trial court with instructions to conduct proceedings to determine whether Appellee is the biological father of C.A.W.. The Court of Appeals explicitly held that Larry A. Heier had standing under the unique facts and circumstances of this case. ***(44a - 51a)***

The Court of Appeals did not, as is suggested in the Attorney General's Brief, hold that every termination case requires additional hearings to rule out the possibility that there may be an undisclosed biological parent who needs to be notified. Larry A. Heier was identified in the original pleadings as an interested party and the Circuit Court ordered that he be served. Larry A. Heier actively sought to intervene in the proceedings as soon as he learned about the termination of parental rights. Had the Circuit Court enforced its own orders, the rights of Larry A. Heier could have been adjudicated at the same time as the rights of the natural parents, with no delays. Appropriate limitations on the right to intervene in other cases should be fashioned on the facts as they are presented in future cases.

In this case, protective proceedings were commenced by a petition dated July 31, 1998 on behalf of C.A.W. and his two brothers who are not involved in this appeal. The petition alleged drug use by the mother, Deborah Weber, neglect, and a history of domestic violence by Mrs. Weber's husband, Robert Rivard. ***(6a - 9a)***

Paragraphs 19 and 20 of the petition state:

> "Robert Rivard is the legal father of all three children. Mr. Rivard may not be the biological for any of or all the children. Mr. Rivard and Ms. Weber were married in 1989 and have not yet been divorced. Ms. Weber has admitted to having other relationships with men during her marriage to Mr. Rivard. Christian's alleged biological father is Larry Heier."
>
> "Ms. Weber has obtained a Personal Protection Order against Mr. Rivard due to incidents of domestic violence."

The petition listed Larry A. Heier as an interested party with his address being "unknown".

On July 31, 1998, Judge Pamela Gilbert O'Sullivan issued an order for alternate service ordering that Larry A. Heier be "provided notice of the hearing through publication". ***(1b)***

There is no affidavit or other evidence documented in the file as to what efforts were made, if any, to locate and serve Larry A. Heier with a copy of the petition.

The Proof of Service in the Court file indicates that Larry A. Heier was served by publication in the Macomb County Legal News on July 31, 1998. ***(2b)*** The file does not explain how the publication was accomplished on the exact same date that the Judge signed the order.

The affidavit of publication filed by the Macomb County Legal News indicates that the notice was actually published on August 14, 1998. ***(3b)*** Interestingly, the

notice indicates that Larry A. Heier should appear in Court on August 9, 1998 at 9:30 a.m. (Appellant claims the hearing was actually scheduled for August 19, 1998, but that is **not** what was published.)

At some point, an amended petition was submitted which amended paragraph 19 to delete any reference to Larry A. Heier. The amendment reads:

> "Robert Rivard is the legal father of all three children. Mr. Rivard may not be the biological for any of or all the children. Mr. Rivard and Ms. Weber were married in 1989 and have not yet been divorced. Ms. Weber has admitted to having other relationships with men during her marriage to Mr. Rivard." ***(11a)***

Whether Robert Rivard, Deborah Weber's husband, is the father of the Weber children has remained in substantial doubt throughout these proceedings.

At a review hearing on April 8, 1999, the Judge issued a written order that the "natural father is to submit to paternity testing as arranged by the caseworker". ***(4b)*** There is no evidence, in the file, that this testing ever took place. That order apparently referred to Robert Rivard since a subsequent order which resulted from a hearing on July 13, 1999, ordered "further, Mr. Rivard to comply with the parent/agency agreement, participate in paternity testing. Visits are suspended until he makes himself available to workers and the Court". ***(5b)*** There is no indication in

the file that there was ever any follow up on that order and there is nothing in the file to indicate that a paternity test was ever done.

Ultimately, a hearing was held on November 13, 2000, which resulted in an order terminating the parental rights of Deborah Weber and Robert Rivard in all three children, including C.A.W.. ***(16a - 17a)*** Larry A. Heier was not notified of the termination hearing nor did he attend the hearing. Although the transcript of the termination hearing is not part of the record on appeal, the Attorney General claims that testimony was taken as to the parentage of all three children. This would seem to suggest that the Court still entertained substantial doubts as to whether Robert Rivard was the father of any of the children.

Larry A. Heier has stated under oath, in a verified petition dated January 23, 2001 all of the following; ***(6b - 10b)***:

i. That he is the biological father of C.A.W..

ii. That he provided support to the mother, Deborah Ann Weber, and visited with C.A.W. on a daily basis until C.A.W. was placed in foster care.

iii. He visited with C.A.W. on several occasions, with the knowledge of the foster parent, after C.A.W. was placed in foster care.

iv. He knew that C.A.W. had been placed in foster care but he was constantly reassured that the mother was attending parenting classes and would be regaining custody of all three of her children.

v. That he had never personally received notice of any of the Court proceedings.

On March 8, 2001, Larry A. Heier submitted an affidavit to the Court indicating that he has continuously resided at 31823 St. Margaret Street, St. Clair Shores, Michigan for more than twenty-one (21) years and that he has had a Michigan driver's license showing that address for all of those twenty-one years. He also stated that his address, telephone number and place of employment were well known to Deborah Weber at all times. ***(11b - 13b)***

The affidavit further stated that he did not attempt to intervene in the Court proceedings because he believed the children should stay together and he believed that Deborah was getting the help she needed in parenting skills and would be reunited with the children.

There has never been an evidentiary hearing and the facts sworn to by Larry A. Heier have never been contradicted by any sworn testimony.

Deborah Weber separately appealed the termination of her parental rights. The proceeding is titled ***In Re: Joshua, Brandon, and Christian Weber, Minors, Court of Appeals #232206***. Robert Rivard has not contested the termination of his parental rights. That appeal was denied on October 26, 2001. ***(14b)***

ARGUMENT

THE BIOLOGICAL FATHER HAS STANDING IN CHILD PROTECTIVE PROCEEDINGS TO ESTABLISH PATERNITY TO A CHILD CONCEIVED AND BORN DURING A LAWFUL MARRIAGE OF THE MOTHER.

A. STANDARD OF REVIEW

The Circuit Judge decided the matter solely upon the pleadings and, in effect, granted summary disposition to the Appellees. This Court reviews a judgment on the allegations in the pleadings alone *de novo*. ***Nation's Banc v Luptak, 243 Mich App 560; 625 NW2d 385 (2000)***.

In addition, this appeal involves the interpretation of Michigan Court Rules. "Interpretation of the Court Rules presents a question of law, which is reviewed de novo." ***Nation's Bank v Luptak, Id.***

B. INTRODUCTION

This case involves an important legal issue concerning standing of the natural father of a child conceived out of wedlock but during a period of time when the mother was lawfully married to another man. Prior case law and the applicable court rules presumed that a putative father was entitled to notice of child protective proceedings regardless of the marital status of the mother. The question in this case is whether this Court intended to overrule, *sub silento*, existing law in this area when the Court ruled in an earlier case that a putative father has no standing to bring a paternity action when the mother was lawfully married to someone else at the time of the conception and birth of the child, remained married at the time the paternity action was filed and her husband asserted that he accepted and supported the child as his own. Appellee argues that no such unintended result is compelled by this Court's previous decision and that Appellee clearly has standing to attempt to prove his paternity in these proceedings.

There are also equitable and public policy concerns that weigh in favor of granting Appellee standing. Larry A. Heier has stated in a verified petition and a sworn affidavit that he had established a parental relationship with C.A.W. and had provided support prior to the commencement of protective proceedings. ***(6b - 13b)*** Larry A. Heier is employed, he owns his own home, he is not on public assistance and

he has retained private counsel, at considerable expense to attempt to establish his paternity.

The legal father was alleged to be abusive and did not even bother to participate in protective proceedings. The legal father did not appeal the termination of his parental rights.

The choice then, in this case, lies between allowing the biological father, who has shown his care and concern, to assume the care and support of his natural son or, on the other hand, to commit the son to the overburdened foster care system with the ultimate goal of adoption by a stranger. Given that choice, the pubic policy options clearly weigh in favor of the biological father.

C. HISTORICAL BACKGROUND

Michigan had historically adopted something called Lord Mansfield's Rule. ***Egbert v Greenwalt, 44 Mich 245; 6 NW 654 (1880)***. The rule stated that neither party to a marriage was competent to testify as to the lack of sexual contact at the time a child was conceived if that child was born while the parties were lawfully married.

In a divorce case, this meant that the husband would be required to pay child support for a child that was not his own since the husband was legally precluded from offering testimony that would make the child illegitimate. The remnants of this rule are what caused the Circuit Court to hold that the Appellant does not have standing.

Lord Mansfield's Rule was abolished in the context of a divorce action in ***Sarafin v Sarafin, 401 Mich 629; 258 NW2d 461 (1977)***.

It is now clearly established that the husband can deny paternity in a divorce action and can be relieved of his duty of support.

The Legislature reacted to ***Sarafin*** by amending the Paternity Act. The relevant definitional section of the Paternity Act, ***MCL 722.711***, now reads:

> "Child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be born or conceived during a marriage but not the issue of that marriage."

Under the Paternity Act, the father of a "child born out of wedlock", can bring a Circuit Court action to establish his paternity and can then seek custody under the Child Custody Act.

This Court interpreted the Legislative amendment in ***Girard v Wagenmaker, 437 Mich 231; 437 NW2d 231 (1991)*** . The majority decision was based upon a very narrow analysis of legislative intent.

The Court held that ***Sarafin*** had created a gap because the old Paternity Act provided no mechanism to compel support for a child who has been determined in a divorce proceeding to be a child born out of wedlock. That was because, before ***Sarafin***, the legal father would be required to support the child and was legally precluded from denying paternity. There previously was no reason to confer standing

on a putative father because Lord Mansfield's Rule would have barred his claim. The Court held that the only intent of the Legislature was to close the gap left by ***Sarafin.***

All that the Court decided in ***Girard***, was that the Legislature did not mean to expand the Paternity Act to allow a putative father to establish paternity where there is an intact marriage, and the legal father supports and accepts the child as his own. The Court did not even discuss abuse and neglect proceedings resulting in the termination of parental rights.

It is submitted that the statute and court rules are different and there are different policy considerations in termination proceedings. In this case, the Court of Appeals was correct in declining to expand the rule in ***Girard*** to overrule existing practice, specifically sanctioned by Court rule, which confers standing on putative fathers. The Opinion of the Court of Appeals should be affirmed.

D. ABUSE AND NEGLECT RULES

This case is not a proceeding under the Paternity Act but rather arose under Article XII(A) of the Probate Code, ***MCL 712A.1 et seq***. This Article does not contain the definition of "child born out of wedlock", relied upon by the Supreme Court in the ***Girard*** case. Rather, the statute only refers to "parent", which term is not defined.

"Child born out of wedlock" is defined in a significantly different fashion in the Michigan Court Rules dealing with child protective proceedings. ***MCR 5.903(A)(1)*** provides:

> "Child born out of wedlock" means a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage."

Unlike the Paternity Act, the Court Rule allows the Court to take judicial notice that a child was not the issue of a marriage.

MCR 5.921(D)[1] provides an extensive procedure for determining the rights of putative fathers. Significantly, the Court rule, unlike the Paternity Act, states

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(D) Putative Fathers. If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4), the court may, in its discretion, take appropriate action as described in this subrule.

(1) The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court shall direct that notice be served on that person in the manner as provided in MCR 5.920. The notice shall include the following information:

(a) that a petition has been filed with the court;

(b) the time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor; and

(c) a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.

(2) After notice to the putative father as provided in subrule (D)(1), the court may conduct a hearing and determine that:

(a) the putative father has been personally served or served in some other manner which the court finds to be reasonably calculated to provide notice to the putative father. If so, the court may proceed in the absence of the putative father.

(b) a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 5.903(A)(4); provided that if the court decides the interests of justice so require, it shall not be necessary for the mother of the minor to join in an acknowledgement. The court may extend the time for good cause shown.

(c) there is probable cause to believe that another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule (D).

(d) after diligent inquiry, the identity of the natural father cannot be determined. If so, the court may proceed without further notice or court-appointed attorney for the unidentified person.

(3) The court may find that the natural father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to legal counsel if:

(a) he fails to appear after proper notice, or

(b) he appears, but fails to establish paternity within the time set by the court.

that a Court can make a determination of whether a child is born out of wedlock "at any time during the pendency of a proceeding".

Also, the Court Rule defines "father" in a manner that is significantly different from the Paternity Act. The language from the Paternity Act that the Court relied upon states "that the Court has determined". By using the past tense, the Supreme Court held that the Legislature intended that the determination had to have been made by a Court before the paternity action was filed.

MCR 5.903(A)(4)(a)[2] uses the present tense "is determined to be".

MCR 5.921(D)(1) goes further and states the Court is required to take initial testimony on the tentative identity of the natural father. All the Court needs do is find that there is "probable cause" to believe that an identifiable person is the natural father and then that person is entitled to notice and opportunity for a hearing to establish paternity.

The Attorney General cites a number of cases for the proposition that Court Rules cannot overrule statutes on issues of substantive law and that the statutes will prevail in case of any conflicts with Court Rules. While this is true, in general, this argument has no relevance to this case.

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[2] (4) "Father" means:

(a) a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock;

First, it is already clearly established law that a biological father has the ability to prove paternity even if the mother was married to someone else at the time of the birth and conception of the child. That is the unequivocal holding of the ***Sarafin*** case. ***Girard*** simply held that this could not be done in the context of a paternity action. This was not because of any positive prohibition in the Paternity Act, but because the legislature had not contemplated such an action and the Court was not prepared to create a remedy that would disrupt an intact family. However, this Court held that the Paternity Act was available if there was a prior Circuit Court determination that the legal father was not the biological father of the child. The question in this case is whether child protective proceedings can serve as that prior determination. A positive answer to that question would not contradict anything in the Paternity Act.

Second, unlike ***Girard***, the Court Rules have provided a procedure for a putative father to establish paternity through successive legislative amendments of the protective proceedings statutes yet the legislature has failed to address the issue. In such a situation, this Court has held that the legislature intended to acquiesce in the existing interpretation of the statute. ***Smith v City of Detroit, 388 Mich 637, 202 NW2d 300 (1972)***. ***MCR 5.921*** was adopted effective January 1, 1988 in roughly its present form. There have been amendments to various sections of Chapter XII of the Probate Code, ***MCL 712A.1 et seq*** in almost every subsequent year.

Third, the question in this case does not involve the issue of whether a putative father has any rights - that was already decided in ***Sarafin*** - but in what context those rights can be asserted. It is submitted that this is a classic procedural issue which can be properly addressed by a Court Rule.

The case law dealing with conflicts between statutes and Court Rules is not relevant because there is no conflict. The Court Rules were properly applied by the Court of Appeals to give Larry A. Heier standing.

In this case, the Court had more than probable cause to believe that Larry A. Heier was the biological father of C.A.W.. There was an actual pleading filed in the case which identified Larry A. Heier as the father. ***(6a - 9a)*** The Court even entered an Order of Substituted Service by Publication in the protective proceedings. ***(1b)*** The Court also ordered paternity testing of the legal father which was apparently never carried out. ***(4b - 5b)***

The issue of standing did not even arise until the Attorney General filed a brief, very late in the proceedings, which relied upon an unpublished opinion of the Court of Appeals. The County Prosecutor essentially conceded that Larry A. Heier was the putative father and had standing. The argument raised was that service was process was adequate under the circumstances and that Larry A. Heier was guilty of laches and had waived his right to further notice. ***(15b - 23b)***

The Court of Appeals has previously determined the precise standing issue in this case in the case ***In the Matter of Kozak, 92 Mich App 579; 285 NW2d 378 (1979)***. In that case, the mother and her husband joined in a petition in the Probate Court to terminate their parental rights so that the child could be placed for adoption. The mother alleged that she had become pregnant as a result of a casual encounter in a bar and that she did not know the identity of the father. The Probate Court terminated the rights of the unknown father and placed the child for adoption with Catholic Social Services.

Some time afterwards, the natural father found out about the proceedings and filed a petition for a hearing with the Probate Court to stop the adoption proceedings.

The Court of Appeals held that the putative father had a right, under the statute, to notice and a hearing. Since he had not been notified, he had the right to intervene, post judgment, and establish his paternity. The Court held that the child could not be placed for adoption until the rights of the putative father had been properly terminated pursuant to statute. The case was remanded to the Probate Court for a hearing to determine the best interest of the child and whether petitioner would be awarded custody.

Contrary to the argument of the Attorney General, ***Kozak*** was not decided on the basis of fraud. The Court held that the mother had committed a fraud on the Court by not disclosing the identity of the biological father, but the fraud would have been

immaterial unless the biological father had a right to be notified. The fraud analysis was only used to explain why the generic newspaper notice did not bar post-judgment relief to the alleged natural father.

More recently, the Court of Appeals held that a man legally married to the mother of a child conceived and born during the marriage did not have standing in proceedings to terminate parental rights because he was in prison at the time of conception. ***In re Montgomery, 185 Mich App 341, 460 NW2d 610 (1990)***. The biological father was held to be the proper party with standing as the father of the child.

The ***Kozak*** and ***Montgomery*** cases were already established law at the time this Court decided the ***Girard*** case under the Paternity Act. It is submitted that the ***Girard*** case is not dispositive of this case which is brought under an entirely different statutory scheme which has always considered the interests of putative fathers regardless of the marital status of the mother.

E. PUBLIC POLICY CONSIDERATIONS

In ***Girard***, this Court was justifiably concerned with interfering with an established parent/child relationship within an intact marriage. There are public policy reasons why a Court would not permit a paternity action to intrude upon that relationship. In any event, this Court held that the Legislature had no such intent.

In child protective proceedings, the policy considerations are altogether different. In this case, the legal father was alleged to be abusive and the petition indicates that there was even a protective order entered against the legal father. ***(6a - 9a)*** The mother was adjudicated guilty of neglect and the children were placed in foster care. There is no relationship to break up.

This Court previously addressed public policy considerations when the only choices for placement of the child were a less than ideal biological parent and the foster care system of the State. ***In the Matter of Barlow, 404 Mich 216, 273 NW2d 35 (1978)***. The Court held that there is a preference to place a child with a natural parent and that the natural parent is not in competition with a hypothetical placement with the State which is subject to change at any time. The Court refused to consider the argument that it would be in the best interest of the child to be adopted by a better family who has not even been identified.

In this case, Appellee alleged he had an established parental relationship with the child and that he was willing to support the child. The choice faced by the Court is not between breaking up an intact family unit and awarding the child to a third party. Rather, the choice lies between allowing the child to be placed with the natural father who has indicated care and concern for the child as opposed to institutionalizing the child in the State foster care system. It is submitted that this is no choice at all.

The argument of the Attorney General that the decision of the Court of Appeals violates public policy as is set forth in the Safe Families Act of 1997 is hard to understand , particularly since none of the substantive provisions of the Act are cited. Apparently the argument is that an ultimate placement for adoption will be delayed by having to go through the legal niceties of providing due process to putative fathers. The Attorney General apparently misses the point that the child will never need to be adopted if a suitable biological parent assumes responsibility for the child. This Court has already stated a preference for placing children with their natural parents.

The Attorney General also argues that there is a strong public policy against making a child illegitimate. While that may be true, in the abstract, that argument has no application to the facts of this case. These children have already been made orphans and wards of the State. The effect of the Court of Appeals' decision will be to allow a man with biological links to one of the children to demonstrate his fitness to assume his responsibilities as a father to this child. That would certainly outbalance any perceived stigma of labeling this child as illegitimate.

Public policy would favor placing the child with a natural parent and relieving the State of the burden of support.[3] There are no countervailing policy arguments in

[3] The Attorney General argues that the State has "diligently" pursued support against Robert Rivard. This apparently consisted only of entering orders which appear to never have been enforced since the same order was entered several times. There is no evidence in the record that Robert Rivard ever supported any of these children.

favor of placing the children in foster care. The Court has full authority to determine Larry A. Heier's fitness as a parent.

A plain reading of the Court Rules involving child protective proceedings gives Larry A. Heier standing to at least have the opportunity to establish his paternity and establish his fitness to take custody of C.A.W.. The Court of Appeals was correct in granting Larry A. Heier standing and in remanding this case to the Circuit Court for further proceedings pursuant to the Court Rules.

F. CONSTITUTIONAL STANDING

The Attorney General cites a number of cases dealing with standing under the Michigan and Federal Constitutions. Appellee does not understand this argument. The cited cases deal with the entirely separate issue of whether the parties have sufficiently adverse interests to satisfy the "case or controversy" requirement of the U.S. Constitution.

It cannot be seriously argued that Larry A. Heier does not have a sufficient stake in the outcome of this case to meet the Constitutional standard. Larry A. Heier is seeking custody of his biological son.

G. PRIOR ADJUDICATION

The Decision of the Court of Appeals fits very neatly into a fabric which takes into consideration all of the various statutory schemes and equitable doctrines

promulgated by the court. It is entirely consistent to permit protective proceedings to serve as the "prior adjudication" required by ***Girard***.

One needs to start out with the basic premise that every child is entitled to two parents as a matter of public policy. The primary focus of the Paternity Act is to identify the father and force the father to assume his responsibilities of economically supporting the child. A necessary corollary is that if a father can be forced to support the child, the father should have rights to seek visitation and custody and should be entitled to exercise parental authority over the child.

In ***Sarafin***, this Court held that the husband, in the context in a divorce action, could deny that he was the natural father of a child conceived and born during a lawful marriage. As a result, the husband could be relieved of the duty to support the child. Such a child would, in effect, become a child without a father.

Because of the ***Sarafin*** case, it is absolutely clear that paternity can be adjudicated in a divorce action and the result becomes the "prior adjudication" required by the ***Girard*** case. It would be entirely consistent to allow child protective proceedings to serve as the same "prior adjudication".

The Attorney General appears to concede that, had Robert Rivard denied paternity, Larry A. Heier could have been adjudicated the natural father in child protective proceedings and could have been required to pay support. Had that

happened, Larry A. Heier would have then had the opportunity to seek custody and/or visitation. This result, at any rate, is compelled by ***Sarafin***.

The Attorney General's position is this case seems to hinge on a dubious factual assertion by Robert Rivard that he believes he is the father of the child.[4] Had Rivard denied paternity, ***Sarafin*** would have required an adjudication in the child protective proceedings. There is no legal or practical reason why the abusive father, who appears not to even have contested the termination proceedings, should have veto power over Larry A. Heier's right to prove he is the real father.

Whether the legal father admits or denies paternity should make no difference to the standing of the biological father. What if the mother claims that someone other than her husband is the father but the husband continues to assert paternity? Does the biological father have standing? What if, as in ***Montgomery***, the legal father's paternity is a physical impossibility, but he continues to claim he is the father? Does the biological father have standing?

The most sensible approach is that which is taken by the Court Rules. Once there is a good cause to believe that someone other than the husband is the biological

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[4] That issue could be resolved by a simple blood test, which is all that the Court of Appeals decision requires. Indeed, the situation would never have even gotten to the Court of Appeals had the trial court enforced its own Orders and required Robert Rivard to submit to paternity testing.

father, that third party should be identified and given an opportunity to participate in the proceedings.

If, in some future case, the legal father wishes to continue to be recognized as the father, the Equitable Parent Doctrine fits very nicely into this overall fabric to relieve any injustices that might result from an absentee father suddenly stepping forward. A mere biological link does not automatically give the biological father the right to custody to the exclusion of any other father figure. Under the Equitable Parent Doctrine, even if Robert Rivard was determined not to be the natural father of the Weber child, he would have the opportunity to prove that he had, to all intents and purposes, served as the father and should be so recognized by a Court of equity. The Court, using the "best interests of the child" test could have determined that Rivard, rather than Heier was entitled to custody of the Weber child.

Of course, no such situation exists in this case.

The Court of Appeals was correct in holding that protective proceedings could serve as the "prior adjudication" required by ***Girard***.

H. DUE PROCESS

This Court's Order granting leave to appeal does not seem to permit arguing a due process claim but this issue is addressed in the Attorney General's Brief.

In his petition, Larry A. Heier alleged that he had established a parental relationship with the child beginning with the child's birth until the time the child was placed in foster care. Larry A. Heier also alleged, in verified pleadings, that he had provided support to C.A.W.. ***(6b - 10b)*** The Trial Court, in its decision, never addressed the issue of whether Larry A. Heier had a due process right to establish his paternity.

There are several decisions of the Court of Appeals that have held, notwithstanding ***Girard***, a putative father may have standing where there was an established parental relationship. In ***Houser v Reilly, 212 Mich App 184; 536 NW2d 865(1995)***, the Court of Appeals held that a mere biological link did not confer standing under the Paternity Act. However, the Court held, under the due process clause of the Michigan Constitution, that there is a protected liberty interest in family life if, in fact, there was a relationship with the child prior to filing the paternity action. The Court held, under the facts of the case, that no such relationship had been pleaded and denied standing to the petitioner.

Appellant is aware that there is authority to the contrary, particularly, ***McHone v Sosnowski, 239 Mich App 674; 609 NW2d 844 (2000)***.

There are several other decision of the Court of Appeals which have gone both ways on this issue. However, all of the cases involve the Paternity Act, where the

language is much more restrictive. No Court has squarely determined the constitutional issue and this Court specifically avoided a constitutional decision in ***Girard***, stating that the parties had not raised this in the pleadings. There is an even stronger due process argument in child protective proceedings that the putative father has a liberty interest which he should be allowed to assert. This case should be remanded for a further development of the facts to determine the nature of the established family relationship.

This record is not adequate for a determination of a due process claim. Larry A. Heier is only asking for an opportunity to make such a record and there is support in the case law for his claim. The due process claim is not frivolous and Larry A. Heier's claim is supported by sworn affidavits. Larry A. Heier is entitled to his day in Court to prove his claim.

I. SERVICE OF PROCESS

Larry A. Heier was never legally served with the initial petition and has not waived his right to further notice. Appellee was served by publication and even the notice was published after the date set for the hearing. ***(1b - 3b)*** Further, Appellee was not served with notice of the termination hearing, which is an independent requirement of the court rule.

The U.S. Supreme Court has long ago established, as a matter of Federal Constitutional Law, that newspaper publication of notice is not permissible where the whereabouts of a party can be ascertained with reasonable efforts. ***Mullane v Central Hanover Trust Company, 339 U.S. 306 (1950).***

The Court held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present objections. . . The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance,. . .
>
> * * *
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it . . .
>
> * * *
>
> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's circulation the odds that the information will never reach him are large indeed.

The Michigan Courts have been very strict about applying the ***Mullane*** requirements. For example in ***Prosoli v Mullins, 314 NW2d 508, 111 Mich App 8 (1981)***, the Court set aside a default judgment because "we conclude that the notice in issue was not reasonably calculated to inform defendant of the pendency of the action".

The Court held that the affidavit in support of the request for substituted service was inadequate as a matter of law even though it stated that an investigator had visited possible addresses of the defendant, had checked with the Secretary of State and the phone company and had interviewed neighbors of the defendant.

In this case, we do not have any evidence that even these steps were taken.

The Michigan Supreme Court has further held, in ***Krueger v Williams, 410 Mich 144, 300 NW 2nd 910 (1981)***,

> "It is significant that in every instance where alternative means of giving notice were available which were better calculated to give actual notice, the Court held service of process by publication constitutionally deficient."

Service by publication is a last resort measure which can only be used when no other means of locating a party are available. That is because "service" is a legal fiction in most cases, as here, and due diligence of a party intending to rely upon publication is subject to intensive judicial scrutiny.

This is not even a close case. Even if Deborah Weber could not be relied upon for information, the court appointed foster parent knew how to contact Larry A. Heier. Also, a simple public records search would have revealed his address of 21+ years.

Service of process was not constitutionally adequate and Larry A. Heier has not waived his rights to proceed.

Even if initial service was proper, ***MCR 5.921(E)*** provides:

> **(E) Failure to Appear; Notice by Publication.** When persons whose whereabouts are unknown fail to appear in response to notice by publication or otherwise, the court need not give further notice by publication of subsequent hearings **except a hearing on the termination of parental rights**.

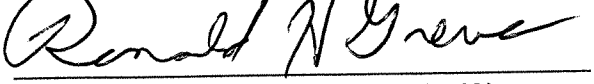
The court file does not show that such required notice was given and Larry A. Heier asserts that he was never notified.

CONCLUSION AND PRAYER FOR RELIEF

For all of the above stated reasons Larry A. Heier requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

DINNING & GREVE, P.L.C.

BY: 

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